IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 622.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL OF LEE HOFFMAN, DECEASED, RESPONDENT.

Brief of Petitioner in Support of His Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The primary ground of the petition submitted in this cause is that of a divergence on the part of the court of appeals for the ninth circuit from the principles laid down by this court as controlling the disposition of such causes as that under consideration; or, in brief, that the decision against which this petition is addressed is at variance with the decision of this court in *Brooks vs. Martin*, 2 Wall., 70 and the subsequent rulings of the court in line with that case. If a departure has been made by the court of appeals,

as we contend, it has occurred in the administration of general jurisprudence; it has declared for the ninth circuit a different rule from that established by this court; it is at variance with the decisions rendered in other circuits in like cases, and is a disturbing factor in the federal jurisprudence of the country. One of the chief grounds for the exercise of the relief here sought is that of preserving uniformity of decision, and we believe the case under consideration merits the corrective action of this court.

In February of 1893 the city of Portland, Oregon, advertised for sealed proposals for the construction of a system of water works, the bids to be opened March 1. The petitioner, a resident of San Francisco, and Lee Hoffman, a resident of Portland, were desirous of bidding on the work, but neither of them feeling that he could undertake it singly, for reasons of convenience and advantage they determined to combine their forces. To this end they entered into a verbal agreement to bid for the work, which was to be let in parcels, and that if they should succeed in securing any part of it they would jointly execute the same and share equally its profits and losses. In pursuance of this agreement they did make bids, not single proposals in their joint names, but each bid separately on the same work, petitioner in the name of the San Francisco Bridge Company, a corporation of which he was general manager, and Hoffman in the name of Hoffman & Bates, a title under which he conducted business. On the item of manufacturing and laying the pipe a bid so submitted by Hoffman was found to be the lowest, entitling him to the contract therefor.

On March 6, 1893, petitioner and Hoffman entered into the following contract (record, vol. 2, p. 492):

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and

Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid.

"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits, or bear and pay one-half of the losses, which shall result therefrom.

"And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

On March 10 the city of Portland entered into a contract with Hoffman, agreeing to pay him for the work contemplated $465,722, with a right reserved for modifications, increasing or diminishing the contract price. Petitioner and Hoffman entered upon the joint execution of the work covered by the contract, and there was eventually earned under it $509,825.22. Other work was done, for which the city of Portland paid $14,496.74, and for which the additional amount of $16,961.25 was claimed and disallowed by the city. As profits from conducting a camp and store for the men employed, from sale of live stock, etc., an additional sum of $15,339.76 was realized, and there had accumulated, in the way of plant, tools, furniture, camp fixtures, etc., property of the cost price of $7,857.36. From all sources a profit exceeding $100,000 was made. (Record, vol. 1, pp. 94–'5.) These facts were developed on taking the proofs. All the money allowed by the city was paid over without objection.

By agreement between the parties Hoffman exercised su-

perintendence of the work, kept all books of account, and received all moneys which the city paid. At the termination of the work petitioner demanded of Hoffman an accounting, and, upon Hoffman's refusal to come to an adjustment, petitioner brought a suit in equity for a settlement of the partnership affairs and the payment of his share of the profits. In his answer Hoffman admitted the partnership agreement of March 6, but pleaded in defense of petitioner's demand that he and petitioner had entered into a corrupt conspiracy to mislead and defraud the city of Portland, and had carried it out by submitting their bids in the way in which it was done,—that is to say, as apparent competitors for the work offered, when they were not competitors in fact. Petitioner excepted to the allegations constituting this defense, and the exceptions were sustained in part, but chiefly overruled. (For opinion see record, vol. 1, p. 58.) Issue was joined, the proofs taken, and on final hearing a decree was entered in favor of petitioner for the recovery of $52,519.80, and holding that petitioner was in addition the half owner of the disputed claim for extra work of $16,961.25 and the items of camp equipment of $7,857.36 above mentioned. (Record, vol. 1, pp. 91–'6.)

Petitioner has throughout the litigation denied the charges of fraud preferred against him, but he has also contended that under the rule laid down in *Brooks vs. Martin* he is entitled to a decree, whatever conclusion the court might reach on this issue. The circuit court of appeals held that *Brooks vs. Martin* afforded petitioner no protection, and made a sweeping reversal of the decree of the lower court. On a petition for a rehearing the court declined to recede from or modify their views.

The contract of March 6, 1893, established the relationship of partners between Hoffman and petitioner; and out of this relationship, and not out of the partnership agreement, grew the rights which petitioner is seeking to enforce in this suit.

Some preliminary consideration of the rights and obligations existing between partners and between principal and agent may prove of utility in approaching a discussion of *Brooks vs. Martin,* and likewise a discussion of the legal questions involved in the pending case.

Partnership is a condition. Its results are determined by the application of legal principles. It may have its origin in an express contract, and the contract may be useful in furnishing a guide for the measurement of the rights and duties of the partners *inter se.* In case of a controversy, its settlement must be determined in the light of the contract stipulations. But the contract is only a matter of evidence in determining the adjustment of conflicting claims growing out of transactions had under it. As to such matters, it is not a cause of suit, nor is the cause of suit predicated upon it. After an agreement to form a partnership has been entered into, if either partner refuses to proceed,—to launch the partnership,—the other may have his action for damages for breach of the contract, or, it may be, a suit for specific performance. In such a case the cause of action rests upon and grows out of the contract to be partners. But after the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership *relation;* and if a claim to property is involved, it is the property right of the partner, growing out of the partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

In Lindley on Partnership, 2d Am. ed., p. 2, it is said:

"Partnership, although often called a contract, is in truth the *result* of a contract; the *relation* which subsists between persons who have agreed to share the profits of some business, rather than the agreement to share such profits."

In Mechem's Elements of Partnership, p. 3, speaking of the definition of "partnership" sometimes given in works on that subject, it is said:

"In several of the definitions, partnership is spoken of as a contract. It is, however, rather the *result* of a contract than the contract itself; it is the *relation* or association which the contract creates."

And in Bates on Partnership, vol. 1, sec. 78, it is said:

"An executory contract to form a partnership is not a partnership, though it may ripen into one by being what is called launched—that is, by carrying the agreement into effect and engaging in the joint undertaking; but the effect and the agreement itself are two different things."

So also, in Pollock's Digest of the Law of Partnership, sec. 1, it is said:

"Partnership is the *relation* which subsists between persons who have agreed to share the profits of a business carried on by all or any of them, on behalf of all of them."

In Parsons on Partnership, 4th ed., sec. 6, note *d*, speaking of an executory contract to form a partnership, it is said:

"The contract is executed when the partnership relation is entered into. All that is done after that, is done by and for the partnership. If land is purchased, it is the land of the partnership, and not of the individual partners. In short, the only action that could be brought for breach of the contract would be an action for failure to launch the partnership. Any cause of action arising after the partnership was formed would arise out of the partnership relation."

Another principle applicable to the point under consideration is that the relation of partnership is one of agency. What one partner does is done as agent for the other; what one receives is received as agent for the other and in trust for the other to the extent of his interest; and the agent or trustee cannot shield himself from accountability by claiming that the thing which had come to him was tainted.

In Story on Partnership, sec. 1, it is said:

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules as those of an agent. A partner, indeed, virtually embraces the character both of principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership."

Speaking of this statement of the law relating to partners, Lord Wensleydale, in *Cox vs. Hickman*, 8 H. of Lords Cas., 268, 311, said:

"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership."

That a partner who receives money or other property on behalf of a partnership owes substantially the same duty as an agent owes to his principal, viz., to account for and deliver the money or property received, is fully recognized and stated in Lindley on Partnership, 2d Am. ed., vol. 1, pp. *107–*108, where the learned author of that work, now the

presiding judge of the court of appeal in chancery, in England, says:

"*Tenant vs. Elliot*, 1 Bos. and P., 3, *Farmer vs. Russell*, *id.*, 296, and other cases, decided that if A and B are parties to an illegal contract, and B, in pursuance thereof, pays money to C for A's use, A can recover this money from C. It follows from this that if two partners, A and B, enter into an illegal agreement with C, and in pursuance of this agreement C pays money to D for the use of A and B, not only can A and B recover this money from D, but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C, instead of paying the money to D, pays it over at once to A or B. In other words, it follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and copartners, he cannot set up the illegality of the act from which the gain accrued as an answer to the demand by them for a share of what he has received. Upon this principle it was held in *Sharp vs. Taylor*, 2 Ph. Ch., 801, that a partner was entitled to an account against a copartner of moneys actually come into the hands of the latter from the employment of a ship in a manner not permitted by the navigation laws."

That the same rule applies between partners as between principal and agent is clearly shown by the decision in *Planters' Bank vs. Union Bank*, 16 Wall., 483, which was a clear case of agency, and in which *Brooks vs. Martin* was followed as having settled the law applicable to the case.

The underlying principle in Brooks vs. Martin and cognate cases is, that the plaintiff in each of them had a property interest in the subject of the suit and a right to require the defendant to respond to his demand, growing out of the relationship between the parties; and the plaintiff's right to recover could not be defeated by showing that he had participated in some illegal transaction which had been consummated before the subject of the controversy came into existence.

In *Brooks vs. Martin* the facts were that Brooks, Martin and Field had entered into a partnership agreement to engage in a business which this court explicitly declared to be inherently unlawful, and the fruits of the business, which became the subject of the controversy between them, were the direct wages of iniquity. Martin sued for an account of the partnership transactions and to recover his share of the profits. He prevailed, and the fundamental principles on which he succeeded were, that his cause of suit was a property right which grew out of his partnership relation with Brooks, and that his share of the profits, which were in Brooks' possession, was held by the latter in trust, and it did not lie in his mouth to question the source from which the profits had come. The corrupt agreement between the partners did not afford nor restrict the cause of suit, although it was necessarily referred to by the court for the purpose of ascertaining the proportions and manner of the division of the assets which was decreed.

Mr. Justice Miller, who delivered the opinion of the court, said (pp. 78–79):

"We think that, in point of fact, the allegation of the answer,—that the traffic in which the firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty

land warrants and scrip—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell vs. Wheeler*, 17 Mass., 281, *Sheffner vs. Gordon*, 12 East, 304, *Belding vs. Pitkin*, 2 Caines, 149, and the others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed.

Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

The learned justice then cited with approval *Sharp vs. Taylor*, 2 Ph. Ch., 801, and concluded that the decree of the lower court was correct.

Brooks vs. Martin followed *McBlair vs. Gibbes*, 17 How., 232, and since has been followed by this court without question, and the rule laid down applied to a variety of controversies. The first case of prominence succeeding it was that of *Planters' Bank vs. Union Bank*, 16 Wall., 483. The Planters' Bank of Natchez, during the civil war, sent to the Union Bank of New Orleans a lot of Confederate securities to be disposed of for account of the former bank. This was done, and the Union Bank failing to make settlement, the Planters' Bank brought suit in a State court to recover the amount which had been realized. The Union Bank pleaded in defense that the traffic was in aid of the Confederate government and was consequently illegal. On writ of error this court said (p. 499):

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may

be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

And in *Railroad Company vs. Durant*, 95 U. S., 576, certain tracts of land had been conveyed in trust to Durant, as vice-president of the Union Pacific Railroad Company, in consideration of the location of the Omaha terminus of the road at a particular point. The railway company contended that the lands were held in trust for it, and, upon Durant's refusal to convey, sued to recover them. The lower court dismissed the bill upon a finding that the conveyances were obtained through an illegal exercise by Durant of his power and position, as acting president and acting manager, and that he held the land of said company in trust for the grantors. The supreme court reversed this decree, saying (p. 578):

"The conveyances to the trustee were, in the view of the law, the same thing as if they had been to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company.

In that obligation there is no pretense for saying there is any taint of any kind; and it is that obligation alone which it is sought to enforce by this proceeding."

In the ninth circuit, before the establishment of the court of appeals, the rule of *Brooks vs. Martin* was recognized by Judge Sawyer. In *Burke vs. Flood*, 6 Saw., 220, a matter of a partnership accounting arose in a case where it was alleged that a fraud had been perpetrated by Flood and his associates upon a third person, and it is said (p. 227):

"When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves." (*McBlair vs. Gibbes*, 17 How., 237.)

The learned judge then quotes from *Brooks vs. Martin* and applies the decision to the case then in hand.

In the eighth circuit the courts have had occasion to apply the rule. In *Western Union Telegraph Company vs. Union Pacific Railway Company*, 1 McCrary, 418, 558, the complainant filed a bill alleging a contract between the parties, whereby the complainant had the right to maintain a telegraphic line along the defendant's right of way, and it was alleged that defendant was interfering with the right thus conferred and threatening to cut the wires which complainant had strung, in consequence of which an injunction was prayed. The contract contained stipulations that the officers of the railway company should have free use of the complainant's wires for their private affairs, and this provision was held to be against public policy, and therefore to avoid the entire contract. A demurrer to the bill was sustained, with leave to amend. In the amended bill it was set forth that certain property rights had been acquired by the complainant under the contract, and it was contended

that the court should protect these rights. This view was sustained, McCrary, J., saying (p. 562):

"Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the Supreme Court of the United States."

After citing with approval *Planters' Bank vs. Union Bank*, *McBlair vs. Gibbes*, and *Brooks vs. Martin*, the opinion proceeds (p. 563) as follows:

"In *Brooks vs. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an act of Congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract, and those in which a court is asked to deal with property which has been acquired as the result of the execution thereof. Such property may constitute the subject-matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired."

It will be observed that the rule of *Brooks vs. Martin* was applied in this case to property acquired under a contract which was still executory.

Another application of the same rule is to be found in *Wann vs. Kelly*, 2 McCrary, 628, where the parties to the suit, together with a third party, engaged in a stock-gambling transaction which proved profitable. Kelly got the proceeds and refused to account to Wann for his share; where-

upon the action was instituted. The court (Nelson, J.) found in favor of the plaintiff, saying (p. 630):

"It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it. If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished. It is settled by the United States Supreme Court (*McBlair vs. Gibbes*, 17 How., 237; *Brooks vs. Martin*, 2 Wall., 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates."

In the opinion rendered by Judge Bellinger on the final hearing, in which he candidly admitted he had been misled by his first impressions of the application of certain decisions which had been cited by the defendant,—and it may be said the circuit court of appeals have construed these decisions and relied upon them just as Judge Bellinger did in the first instance,—he says (record, vol. 1, p. 98):

"When these questions were considered by me on the exceptions to the answer (69 Fed. R. 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The

distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy."

We have quoted at such length from these decisions for the purpose of showing the different conditions in which the rule under consideration has been applied, governing, as it does, questions of partnership, of agency, of traffic agreements, and of general dealings of one party with another. It is held to apply as well to matters which are *mala in se* as to those which are *mala prohibita* only, and the decisions clearly point out, define and limit the instances in which such defenses as those interposed in *Brooks vs. Martin* and in the pending cause may be made available. It is only when the very thing which embodies the vicious element is open and is brought before the court for action which must be predicated upon it that the defense may be made good.

Now, to the apprehension of counsel for petitioner, nothing could be more absolutely clear and free from doubt than that the rule laid down in *Brooks vs. Martin* controls the pending cause, and that the conclusion reached by the circuit court of appeals cannot stand consistently with that rule. And yet there is a marked difference in the character of the two cases. In *Brooks vs. Martin* the whole purpose and existence of the partnership was inherently unlawful; but it is not so in the pending case. The work contemplated by the city of Portland was lawful, and the city invited proposals for its performance. It was lawful for Hoffman and petitioner to combine their forces for securing and executing the work. Their partnership agreement in its objects was unobjectionable. The contract between the city and Hoffman was in itself a proper one. The only ground of attack upon the entire proceedings is that in the accomplishment of their purposes Hoffman and petitioner did an illegal act, to which act, be it observed, the city of Portland has never intimated an objection. It

was essentially a "transaction," in the language of the cases above cited, which was absolutely concluded prior to the 6th day of March, the date of the partnership agreement between Hoffman and petitioner, and prior to the performance of any substantive work from which the moneys and property which constitute the subject of this suit were earned. The case is exactly within the language of Lindley (*supra*, p. 8), in which he says:

"It follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and copartners, he cannot set up the illegality of the act from which the gain accrued as an answer to the demand by them for a share of what he has received."

If *Brooks vs. Martin* was well decided, *a fortiori* the same rule should determine the pending cause in petitioner's favor.

It is true that the attitude of the respondent is that the manner in which she says the contract between Hoffman and the city of Portland was secured poisons everything which has since been done, and this view seems to have met the approval of the circuit court of appeals. In what we may be excused for denominating a confused way of speaking, allusion is made to the "illegal" contract of copartnership and to the "illegal" contract with the city of Portland. We assume that this can mean no more than that there were illegal practices indulged in by the partners, and that the contract with the city was secured in an illegal manner; but, placing that construction upon the facts involved, for the sake of argument, the respondent is not extricated from the binding force of the rule of this court.

Allowing her own construction, or any construction of which the case is susceptible, as to the purposes or action of the partnership existing between Hoffman and petitioner,

the facts remain that when they had despoiled the city, if you please, and had secured a right to the contract which yielded the money in suit, Hoffman did not stop and decline to go further with petitioner. He entered into the engagement of March 6, which was in effect an equitable assignment to petitioner of a half interest in the contract to be entered into between himself and the city of Portland; he delivered to petitioner his share of the booty in the only way in which it was capable of delivery, and thereafter he stood to petitioner as a trustee of petitioner's interest in the city contract, and everything which might be earned under it, and was bound to account to his *cestui que trust* just as any other trustee would have to do in regard to trust property.

In Lewin on Trusts, p. 68, it is said:

"If the settlor proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced, so soon as the settlor has executed an express declaration, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer."

Again, after the agreement of March 6 had been signed, Hoffman did not, as is shown by Mr. Justice Miller in *Brooks vs. Martin* (p. 79) he might have done, refuse to go further on the ground that there was illegality in the object of the partnership, but he and petitioner actually launched the partnership and proceeded to execute the substantive work which was to be performed for the city of Portland. Suppose Hoffman and petitioner had joined in a sale of their contract with the city to a third person and the money had been paid to Hoffman, would the matters which he has set up in this case have been any defense to an action brought by petitioner for his share of the proceeds? And how does the case differ because instead of doing this they worked out the contract and the money earned was paid

over to Hoffman by the city? However the money reached his hands, Hoffman received petitioner's portion as agent and trustee; petitioner's title to it was a property right growing out of his relationship with Hoffman as a partner, and these facts constitute the basis of petitioner's claim, against which Hoffman's defense cannot prevail, for the simple reason that petitioner's right to recover does not depend upon the matters set up in defense. He has not invoked them in aid of his cause, nor asked the court to investigate them.

A series of cases decided in the New England States in connection with their Sunday laws seems to us to make clear the distinction for which we contend. Thus in *Hall vs. Corcoran*, 107 Mass., 251, the defendants hired from plaintiff on a Sunday a horse and sleigh to drive from South Adams to North Adams. From the latter point the defendants drove to Clarksburg, and on this trip the horse and sleigh were injured. To an action for damages the defendants pleaded an illegal contract of hiring. The supreme court said, page 257:

"The wrong committed by the defendants, for which they were sued, was not, as we have already seen, a breach of the illegal contract by which he [plaintiff] put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent, but it is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties, by the wrongful driving of the horse between North Adams and Clarksburg, and thus assuming control of the property for their own benefit, without any authority or license from the owner."

* * * * * * *

"Proof of the contract under which the horse was delivered by the plaintiff to the defendants showed, indeed, that the driving of the horse beyond North Adams was not within its terms or object; but the only legitimate inference from that fact is that it is wholly immaterial whether such a contract was ever made, or, if once made, whether it had been terminated by mutual assent of the parties or by the

wrongful act of the defendants. In short, the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question whether the contract between the parties was valid or void in law, or whether there was or was not any such contract in fact. That contract need not, therefore, be shown by the plaintiff; and if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants."

So in a like case in New Hampshire,—*Woodman vs. Hubbard*, 5 Foster, 67,—the court said, page 74:

"In this case the defense set up is that the plaintiff's contract was not merely invalid, as in the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act.

"It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule when the plaintiff's illegal act is, in whole or in part, *the foundation of his claim*. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. (*Simpson vs. Bloss*, 7 Taunton, 246; *Fivaz vs. Nichols*, 2 M., G. & S., 500). But where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his *right of property* untouched and does not, in its consequences, reach to the case on which he relies."

Petitioner's suit against Hoffman was founded on *property rights* entirely, viz., upon petitioner's equitable ownership of a half interest in the contract made by the city of Portland with Hoffman and on petitioner's ownership of one-half the profits realized from the partnership business carried on by Hoffman and himself, while the fraud and illegality set up by Hoffman and found by the court of appeals lay in trans-

actions which did not in any manner affect the property rights mentioned. It is therefore plain that Hoffman's defense of fraud and illegality did not reach the case made and relied on by petitioner.

If respondent's contention as to the character of the verbal agreement between Hoffman and petitioner which antedated the bidding were true, the matters set up by her cannot avail as a defense, for the reason that the stipulations which she contends were entered into were divisible, and the legal part of the agreement would stand alone.

Again, taking up the contention of respondent and going back to the original engagement between Hoffman and petitioner, we submit that if there had been any fraud or illegality in that portion of their agreement by which they were to bid jointly, this would not affect the other portion by which they were, if they got a contract, to become partners for the performance of the work.

The two portions are quite distinct and separate, and might, if it had been so desired, have been embodied in separate contracts, made at different times. That such is the case is quite clear when it is considered that if, after the contract for manufacturing and laying the steel pipe had been awarded, Hoffman and petitioner had sublet all of the work, or had sold and assigned the contract to a third party, there would then have been no necessity whatever for them to become partners in order to perform the contract. On the other hand, if the contract for manufacturing and laying the pipe had been awarded to some party other than Hoffman and petitioner, and they had bought the contract from the party to whom it was awarded, they could just as well have become partners and performed the work of manufac-

turing and laying the steel pipe as they could had the contract been awarded to them.

And the promises of Hoffman and petitioner, which constituted the consideration in each of said portions of their agreement, were also distinct and separate, the promises in one portion being absolute, viz., to bid jointly; whilst in the other portion the promises were conditional, viz., if a contract should be awarded on a joint bid put in by them they would become partners for the performance of the work.

Hence each portion of said agreement between Hoffman and petitioner was readily severable from the other, and each was substantially a distinct contract, which could if necessary be enforced quite independently of the other.

In *Oregon Steam Navigation Co. vs. Windsor*, 20 Wall., 64, it is said on pages 70–71:

"And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.' The cases cited in support of this proposition are *Chesman et ux. vs. Nainby*, 2 Strange, 739, *Wood vs. Benson*, 2 Crom. & Jer., 94, *Mallan vs. May*, 11 Meeson & Welsby, 653, *Price vs. Green*, 16 *Id.*, 346, *Nicholls vs. Stretton*, 10 Queen's Bench, 346. In *Price vs. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls vs. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had,

previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the exchequer chamber in *Price vs. Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it."

And in *Pickering vs. R. R. Co.*, L. R., 3 C. P., 250, Willes, J., said:

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

So also in *Bank of Australasia vs. Breillat*, 6 Moore's P. C. C., 201, it is said:

"From Pigot's case (6 Coke's Rep., 26,) to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law, the performance of those which are legal may be enforced though the performance of those which are illegal cannot."

It is clear, therefore, that if there had been any illegality in the agreement between Hoffman and McMullen to bid together, or any fraud on their part in obtaining the contract with the city of Portland, that could not affect the validity of their agreement to become partners if a contract should be awarded, or have any effect upon the partnership

afterwards formed by them, or on any of their partnership obligations or transactions in the business of manufacturing and laying steel pipe and doing other work in connection with the construction of water works for said city.

The circuit court of appeals wholly misapprehended the doctrine of Brooks vs. Martin.

Great misapprehension seems to have existed as to the true significance of *Brooks vs. Martin* in its application to this case, and this misapprehension has induced an attempt to draw a distinction between that case and the pending one. It is said that the partnership agreement in the former case had been executed, while here it had not been, and stress is laid on the fact that the land warrants had been located and some of the lands sold. We have endeavored to show that the partnership agreement is not the foundation of this suit, nor was it the foundation of the suit in *Brooks vs. Martin*, and consequently the discussion of this question can hardly prove profitable. But taking the proposition as it has been advanced, we say that the partnership agreement was no more executed in *Brooks vs. Martin* than here; the work of the partnership—the purchase of land claims—had been completed, just as here the work of manufacturing and laying the pipe had been completed, and nothing remained open or to be done in either case, when suit was brought, except to divide the earnings of the partnership.

Again, stress is laid upon the fact that Hoffman had in hand only money which had come to him from the city of Portland without any transformation, whereas in *Brooks vs. Martin* warrants had issued on the land claims and many of them had been located. In the case in hand money is the commercial medium of a settlement between the parties, and it does not seem to us that it makes any difference that it has been secured immediately, rather than at the end of

two or three filtering processes; and to us it seems that the significance of the reference to this transformation in Mr. Justice Miller's opinion is, that the court were called upon to deal with assets which had been purged of their uncleanliness and had assumed a valuable character. In other words, if Brooks had held among the assets in his possession a lot of soldiers' claims upon which warrants had not issued, and Martin had sued at that stage of the partnership life and asked the aid of the court in carrying out the agreement in some way which would have required the court to take action on these claims, it would have declined to do so because they were illegal and were not property or of value, the statute having declared them "null and void to all intents whatsoever." Except, therefore, for the transformation which had taken place there would have been nothing to which the jurisdiction of the court could have attached. By the change the claims had assumed the form of the "thing of value" which was one of the declared grounds of jurisdiction in *Planters' Bank vs. Union Bank.*

Analysis of the opinion of the circuit court of appeals in the light of the cases previously cited herein.

In his dissenting opinion in *Burck vs. Taylor,* 152 U. S. 634, Mr. Justice Jackson said, on page 670:

"The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassments in the administration of the law."

If we substitute the word "cases" for the word "decisions" above, the language used is exceedingly appropriate to the cause under consideration.

In an effort to distinguish this case from that of *Brooks vs. Martin* the circuit court of appeals have taken a number of

positions which seem to us to be legally untenable. It is said in the first place (record, vol. 2, p. 599):

"No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted."

Again:

"The fraud, if any, in the present case was in withholding the truth—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when in fact they were not." (P. 601.)

"In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement." (P. 603.)

Again:

"The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover." (P. 611.)

Again:

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud

complained of is between individuals, which does not in any manner affect the public interest." (P. 612.)

Again:

"This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract." (P. 614.)

Finally:

"If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks vs. Baber*, 53 Ill. 292; *Chace vs. Trafford*, 116 Mass. 532; 1 Am. & Eng. Enc. Law (2d ed.) 437). But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, is for an accounting, and the amount found due in the circuit court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do." (P. 614.)

Reasoning from such premises, it is not difficult to see how it was that the court of appeals failed to follow the decisions of this court. There was at the outset of the opinion a misconception of the "cause of action." We have endeavored to show that petitioner's cause of action was a property right to certain assets in the possession of his asso-

ciate, the duty to pay over which grew out of the relation of the parties and Hoffman's implied obligation to discharge his trust. The cause of action did not rest upon anything illegal.

The court of appeals find that the fraud, "if any," lay in the misconduct of the parties in submitting bids on March 1, 1893, and, such being the case, it was essentially a past transaction, an "accomplished fact," which could not "be affected by any action of the court in this case," in the language of the opinion in *Brooks vs. Martin*. When the court made this finding, we submit they brought the case upon its facts squarely under this decision and those cognate to it, and the result subsequently announced was a clear divergence from the rule of this court.

The court of appeals lay down as cases in which a party cannot recover money connected with an illegal transaction the following:

1. Those in which the plaintiff is obliged to show the illegal contract or transaction in presenting his case.

2. Those in which he must make out his case through the medium of the illegal contract or transaction.

3. Those in which it appears he was privy to the original illegal contract or transaction.

The instance in which he may recover is said to be where there is a new contract, remotely connected with the illegal contract or transaction, and the right to recover is not dependent upon that contract, *but the case must be proved without reference to it.*

The second only of the above propositions is sound, and all the others are at variance with the decisions of this court which have been cited.

In *Brooks vs. Martin* the plaintiff was obliged to show the illegal contract, because it measured the amount of his re-

covery and was indispensable evidence. So, in many cases, although the plaintiff's cause is not grounded upon the illegal contract, he may have to resort to it in evidence for a like purpose, or to identify the subject of the suit, or to establish the time within which something was to be done. An unstamped deed, where a stamp is required, cannot be used to support a claim to the property attempted to be conveyed, but it may be referred to in evidence for a description of the property, or to show when possession of the premises commenced. It is therefore error to say that no recovery can be had where the plaintiff in making his case is simply required "to show" the illegal contract.

In every one of the cases cited it was made to appear, in one way or another, that the plaintiff was privy to an "original illegal contract or transaction," and yet a recovery was not precluded by reason thereof.

The single instance in which, under these rules, the court of appeals allow that a recovery may be had would have absolutely cut off all recovery in *Brooks vs. Martin*.

Now, these are general rules laid down by the court of appeals. Their effect is not solely to dispose of the pending case, but all cases of like character hereafter arising in the ninth circuit will be referable to them. They are wrong. They are inconsistent with the repeatedly expressed views of this court. As long as they stand their effect will be an actual embarrassment in the administration of justice. Take the pending case. The circuit court followed the decisions of this court. The circuit court of appeals say error was committed, and they lay down different principles. What choice shall the circuit court make in the next case of this sort which may come before it? What is another plaintiff in like case to do? This court lay down certain principles by which his property rights are to be governed. The only appellate court to which he has access of right prescribe other rules. Confusion promises to be inevitable, and it may be far-reaching, unless this court shall in the pending

case, or some other which may be brought, cause the matters to be certified up and correct the errors which have been committed.

It is said again that the doctrine of *Brooks vs. Martin* is applicable to "cases where the fraud complained of is between individuals, which does not in any manner affect the public interest." The court could hardly have meant to imply that the rule would not hold in cases where the public interest was affected, and yet that is the deduction to be drawn from the statement made. There is no such limitation in *Brooks vs. Martin*, and in the very nature of things there cannot be. Cases of this class are all referable to the question of public policy, and that means public morals, public health, the maintenance of a standard of integrity in the community. The fact that the public, rather than an individual, may be defrauded of a sum of money through some evil practice does not constitute the heinousness of the offense, but it is the practice itself. If, therefore, it can be possible the court thought they were not bound by *Brooks vs. Martin* because the city of Portland was financially concerned, an undoubted error was committed. Taking the term "public interest" in its proper sense, no case of this character could possibly arise in which that interest would not be affected.

To our minds, it is an entire misconception of the nature of the case to hold, as the court of appeals did, that the foundation of petitioner's case rested upon the legality of the contract between Hoffman and the city of Portland. Our reasons have been stated above.

It is seemingly conceded by the court of appeals that if Hoffman had admitted that he owed petitioner a specified sum of money, petitioner might have recovered it upon an account stated. On what theory? Solely on that of an implied promise to pay. But is not Hoffman's implied promise to account to petitioner, as his trustee, for petitioner's property held in trust just as available? If not, why

not? If petitioner had secured access to Hoffman's books and learned the state of the business and the amount due him as his half of the profits, can any good reason be assigned why he might not have sued Hoffman at law for money had and received to his use? He cannot be made to suffer because for want of this knowledge he was compelled to call on Hoffman for a discovery. His property rights do not stand or fall by reference to the form of action to which he was compelled to resort for their enforcement. If Hoffman's defense would not be available against the implied promise arising from an account stated, neither is it available here.

The petitioner did not require the aid of the matters found by the court of appeals to be illegal, and his case was not in anywise dependent upon such matters.

The court of appeals were in great error when they found that the relief prayed for called upon them "to investigate all of the various transactions of the parties from the beginning to the end;" "to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils."

It is true that in the bill of complaint allusion is made to the bidding as introductory of the contract between Hoffman and petitioner, but the allegations were purely by way of inducement. The bill would have been every whit as good without these allegations as with them, and petitioner would have omitted them had he foreseen in any degree the course subsequently adopted by Hoffman. When it came to the taking of the testimony petitioner opened his case by introducing the partnership agreement of March 6, 1893, and objected to all of respondent's evidence which

has relation to matters antedating the agreement. (Record, vol. 1, p. 172.)

The decree of the circuit court commences with a finding that on the 6th day of March this agreement was entered into, and then proceeds to dispose of the controversy with this date as the initial point. (Record, vol. 1, p. 92.) We submit that the petitioner was right in the course he pursued, and that the decree is well framed.

The petitioner did not call upon the court to examine any of the matters which the court of appeals find to have been noxious, nor did his right to recover depend upon them in any degree. He had made his case without reference to them. All the matters constituting the basis of the relief sought by petitioner were to be found in the books of account kept by Hoffman (just as was the case in *Brooks vs. Martin*), and ascertaining from the partnership agreement of March 6 that petitioner was entitled to half the earned profits, the rest was simply a proposition of mathematical calculation. Indeed, there was no real occasion for petitioner's offering the partnership agreement at all, for its terms and the fact that the parties had entered into it, as alleged in the bill, were admitted in the answer, so that the court need have looked to the books of account alone. And so far as the court of appeals were concerned, the results shown by the books appear in the record by an agreed statement of facts.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner's right of recovery.

Welch vs. Wesson, 6 Gray, 505, presents an analogous case. The parties had engaged in a driving contest for a wager, and in its progress defendant wilfully ran down plaintiff and broke his sleigh. To plaintiff's action for damages defendant was allowed to prove that the parties were violating the law when the injury occurred. On appeal the court said:

"That he [plaintiff] had no occasion to show into what stipulation the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from the proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another."

In *Armstrong vs. American Exchange Bank*, 133 U. S., 433, the court say, page 469:

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."

And in *Swan vs. Scott*, 11 S. & R., 155, 164, the rule is stated thus:

"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction, to establish his case."

Here petitioner made complete proof without reference to the alleged illegal transactions. He sought no aid from them and required none. So far as his partnership agreement is concerned, it was supported by his promise to per-

form services for the firm. So far as his right to share the profits earned by the firm went, his demand was supported by the services he had performed.

We trust we have made clear our contention that the decision sought to be reviewed is not in harmony with the decisions of this court. That the court of appeals may have undertaken to distinguish the case signifies nothing, unless their distinction is sound. If the facts of the case bring the rights of petitioner under the rules laid down by this court, and these rules would give a different result from that arrived at by the court of appeals, then, whatever ill-grounded distinctions may have been attempted, there is discord.

Supposing the work performed by Hoffman and petitioner under the principal contract which resulted from the bidding to have been tainted by the matters set up by respondent, these matters afford no ground for denying to petitioner his share of the moneys otherwise earned.

What has been so far written has had relation to the principal contract secured from the city of Portland under the bidding which has been referred to. In the partnership contract of March 6 Hoffman and petitioner agreed that if they should do other work for the city of Portland they would share equally its profits and losses. The circuit court found (record, vol. 1, pp. 94–'5) that the parties had earned and Hoffman had been paid "for extra work $14,496.74;" that there had been earned, as "profits of camp, store, sale of live stock, interest, etc., $15,339.76;" and that Hoffman was in possession of the following assets, of which he and petitioner were joint owners, viz: "Plant and tools, cost price, $6,234.60; furniture and fixtures, cost price, $187.85; camp fixtures, cost price, $1,246.16; miscellaneous accounts, $188.75; disallowed

claim against the city of Portland, $16,961.25." The latter item is for extra work and is identical with that of $14,496.74 above. (Record, vol. 1, p. 93.)

These findings have never been disturbed, but, on the contrary, in an agreed statement of facts entered into for the purposes of the appeal, it is stipulated (record, vol. 1, p. 119) that there was earned, as "extra work not under contract, $14,496.74;" that "during the progress of said work a store was kept and laborers were boarded, from which and other sources a profit was realized amounting to $15,339.76;" that Hoffman claimed to have performed other extra work and furnished other materials, for which he claimed compensation, but which claim had not been allowed by the city, and "that the amount so claimed and rejected by the city is about $17,000." There is no dispute about these facts.

These earnings did not result from the work performed under the bidding, or from the contract which was awarded Hoffman; and granting, for sake of argument, the full measure of respondent's contention in regard to that work, we ask what good reason can be assigned for refusing to give petitioner his just share of these assets? Yet the circuit court of appeals have allowed respondent to appropriate the whole of them. Clearly these matters are separable from the work done under the principal contract, and they are not affected by any taint which may by possibility be found to impair petitioner's right to recover his interest in the results of that contract.

The petition for the writ which we have submitted assigns other grounds of error. Petitioner was unwilling to allow the matters to which they are addressed to go unchallenged, but we forbear any discussion of them, as they do not constitute the substantive ground of the petition. It may be remarked in passing, however, that there is a marked difference of opinion between the circuit court and the court of appeals concerning the matters to which these exceptions are taken.

The decision of the circuit court of appeals should be corrected because it is not in harmony with the decisions of this court, and because petitioner has a right to invoke the rules laid down by this court for the protection of his property interests.

In cases of this character, the jurisdiction of the federal courts depending on diversity of citizenship, the decisions of the courts of appeal are final, and if they are erroneous the only way to correct them is through the medium of the writ now sought.

It seems entirely clear to counsel for petitioner that the decision sought to be reviewed establishes for the ninth circuit, in cases to which it may be held applicable, a different rule from that laid down by this court as governing such cases, and that it ought to be corrected as misleading. It is for just such purposes as this that the writ was provided by Congress.

We have found no instance in which the writ has been applied for on the score of lack of uniformity between the decision sought to be reviewed and the decisions of this court. It was held in *Columbus Watch Company vs. Robbins*, 148 U. S., 266, that the fact that the circuit court of appeals for one circuit had rendered a different judgment from that of the circuit court of appeals for another circuit under the same conditions might furnish grounds for the allowance of the writ. In *Forsyth vs. Hammond*, 166 U. S., 506, the writ was allowed because of a disagreement of the circuit court of appeals and the supreme court of the State, sitting within the same circuit. And in *Phenix Insurance Company vs. Steel, Administrator*, in 1893, from the ninth circuit, the writ was allowed on the grounds of lack of uniformity between federal courts, as between each other and with regard to State courts, and a difference of opinion between the judges of the ninth circuit over the question involved. On the final

hearing of the case last referred to there was an equal division of the court, and no opinion was rendered.

When the inferior courts do not follow the decisions of this court the power of correction exists, and there are the most imperative reasons for its exercise. This court is the supreme and central controlling influence over the whole federal judicial system, and when they have announced a rule of law as applicable to any case or class of cases, that rule should prevail everywhere as the law of the land. In this aspect the case presents a matter of public interest.

But if this court have laid down a rule protecting petitioner's interests in the matters in controversy, and he has been deprived of them by a want of adherence to that rule, he has a peculiar right to ask that the wrong done him by the decision of the court of appeals shall be undone.

It is submitted that this case furnishes an occasion for the interference of this court to correct the decision of the court of appeals, which is objectionable from a moral as well as a legal standpoint.

Respectfully,

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